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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

No. [redacted] 73

SAMUEL R. BEARD, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Samuel R. Beard, by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the District of Maryland, at Baltimore.

OPINION BELOW

The District Court wrote no Opinion. The Opinion of the Court of Appeals, attached to this Petition, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1955. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254, of the United States Code.

QUESTIONS PRESENTED

1. Did the Court of Appeals below err in holding that the personal books and records required to be kept by Petitioner under the Internal Revenue Laws fall outside the constitutional protection of the Fifth Amendment under the public records doctrine enunciated in *Shapiro* v. *United States*, 335 U.S. 1?

2. Did the District Court err in instructing the jury that the taxpayer had a right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by Revenue Agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution but that such failure to produce the books and records was a circumstance which the jury might consider in determining the issue of wilfully filing a false return?

3. Did the Government properly establish the taxpayer's net worth at the beginning of the taxable year in question sufficiently so as to present an issue which the jury should determine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution

"No person * * * shall be compelled in any criminal case to be a witness against himself. * * *"

Internal Revenue Code

Sec. 145 PENALTIES

* * *

(b) Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax—any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction

thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the cost of prosecution (26 U.S.C. 1946 ed. Sec. 145).

Section 275 PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*

The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (26 USC 1946 ed. Sec. 275(a)).

Sec. 3614 EXAMINATION OF BOOKS AND WITNESSES.

(a) *To determine liability of taxpayer.*

The Commissioner for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (26 USC 1946 ed. Sec. 3614(a)).

Sec. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To enforce summons.*

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (26 USC 1946 ed. Sec. 3633(a)).

STATEMENT OF THE CASE

Petitioner, Samuel R. Beard, was tried in the District Court of Baltimore before a jury upon two indictments charging him with wilfully attempting to evade his income taxes for the years 1944, 1946 and 1947 by filing false returns with the Collector of Internal Revenue in Baltimore, Maryland in violation of Section 145(b) of Internal Revenue Code. He was found guilty upon the charge covering the year 1944 and was acquitted of the charges covering the years 1946 and 1947. Prior to the trial a similar charge covering the year 1945 was dismissed as barred by limitations.

The charge of the indictment for the year 1944 was that Beard had filed a false return stating that his net income was $16,751.76 and the tax due was $5,555.88, whereas he knew his net income was $542,216.27 upon which he owed a tax of $483,563.30. The Government conceded that Beard's return correctly reported his net income from real estate and investments but contended that he had failed to report a large net income from gambling. Beard's position in reply was that the losses in his gambling operations had exceeded his gains in this year and therefore his return, prepared by a public accountant, made no mention of gambling operations.

This return, along with the returns for the years 1945, 1946 and 1947, was assigned to Revenue Agent Samuel W. Ford for examination and audit on November 21, 1947. After a preliminary analysis of Beard's bank accounts, Ford and his group chief requested the cooperation of the Intelligence Unit and Special Agent E. Russell Kennedy, Jr. was assigned to work with Agent Ford on the criminal aspects of the case.

Following a telephone request from Special Agent Kennedy, on April 6, 1948 Beard and his wife permitted the agents to inspect and inventory their safe deposit boxes. Beard's box contained the usual papers, $6,500.00 in United States bonds and $15,000.00 in cash.

The Agents then asked to look at Beard's gambling records. Beard stated that they were in the hands of the accountants whose names were revealed on his tax returns. Beard said he would get the books together and call Agent Kennedy in a few days.

About two weeks later, Beard's counsel told the Agents that he would be happy to supply all records if and when the criminal aspects of the case were disposed of, otherwise if the Agents wanted the records they could get them by summons or subpoena. The Revenue Agent saw fit not to secure the books and records by lawful process (A. 150). The reason for the Agent's action in this regard is given on page 681 of the Transcript of Testimony wherein Agent Kennedy testified that if the books and records were subpoenaed the information would not be admissible in trial against the Petitioner.

At the trial, the Government resorted to two methods of indirect proof of income which differed widely as to Beard's alleged net income and tax liability. Method Number 1, presented by Revenue Agent Ford, totaled as receipts all monies deposited in the bank accounts of Beard and his wife. For the year 1944 these amounted to $248,-198.01. To this total was added $717,384.50 representing the total of checks drawn by persons other than Beard or his wife on banks outside the District of Columbia which bore the signature of Beard or his wife as last endorser. Certain local checks discovered by the Agents were then added to make the grand total of receipts $975,238.81. From the total thus derived initially the Government eliminated certain known non-income items, duplications of receipts and gambling expenses totalling $331,713.01. As a result of evidence produced at the trial the Government made adjustments totalling $74,111.10 which resulted in an alleged adjusted net income of $534,135.65 upon which the tax was computed to be $460,220.86.

To identify the source of the receipts as gambling income the Government called eight witnesses who identified only 77 checks totalling $236,503.10 which bore Beard's

signature as last endorser and which had been cashed or deposited by him. Of this total $50,803.10 was identified as receipts from gambling. The Revenue Agents were unable to interview many of the makers or prior endorsers of checks bearing Beard's name as last endorser and therefore assumed that these checks were income to Beard unless he proved to the contrary. In cases where the Revenue Agents did interview the makers or prior endorsers and the maker or prior endorser was unable to say why the check was given to Beard the Revenue Agent treated those checks as income to Beard unless he could prove to the contrary. In opposition, through cross-examination of these and other witnesses gambling losses by Beard in the amount of $71,682.80 were shown.

Method Number 2, presented by Special Agent Kennedy, was based upon a net worth statement prepared by him. This method indicated a net taxable increase for the year 1944 of $89,804.86. Kennedy admitted that this amount required adjustment downward to the extent of $4,775.00 to cover Home Owners Loan Corporation bonds not included in the base year and sold by Beard in 1944. Further adjustment to eliminate certain checks totalling $38,732.87 which had been issued by Beard late in December 1944 but had not cleared the bank until January 1945 and thus were erroneously included in his year-end bank balance was indicated (A. 157). Without making the indicated adjustments the income tax due was computed to be $63,877.64.

Under Method Number 1, the Government contended that Beard had understated the tax due by him by $454,664.98, whereas under Method Number 2 the understatement was allegedly $58,321.76, without making the indicated adjustments.

Relying upon the failure of the Government to meet the burden of proof, Beard elected not to take the stand. The defense offered the testimony of two accounting experts, the Chairman of the Maryland Board of Examiners for Certified Public Accountants and a Professor of Accounting at the University of Maryland, who described Method Num-

ber 1 as an "accounting monstrosity" from the point of view of trying to arrive at Beard's net income. (A. 325) In addition the defects in Method Number 2—that the opening net worth did not credit Beard, a gambler on a large scale, with any cash on hand, and that there was no certainty that all Beard's assets and liabilities had been included—were pointed out (A. 326).

The trial court instructed the jury:

> "Also, I instruct you that the taxpayer who keeps records or books of account is required to produce them at a reasonable time for inspection by the duly authorized Government revenue agents in connection with their administrative duties in checking the correctness of the returns, and failure or refusal of the taxpayer to produce his books and records for such purpose is a circumstance which may be considered by you, the jury, in determining the issue of whether he has wilfully filed a false return.
>
> "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitution to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional priviledge against self-incrimination is not impaired by the rule that the Court has just stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in a criminal proceeding such as this" (A. 368).

Petitioner objected that this instruction, though correctly recognizing his constitutional right, completely nullified that right by stating that his exercise of the right was a circumstance which might be considered by the jury in determining the issue of wilfully filing a false return. The Court of Appeals found no error and held that under *Shapiro* v. *United States*, 335 U.S. 1, income tax records fall outside the constitutional protection of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

1. The Public Records Doctrine Enunciated in Shapiro v. United States Should Not be Extended so as to Apply to the Books and Records Required to be Kept by an Individual Under the Internal Revenue Laws.

The vital issue in this case is whether the provision of the Fifth Amendment to the Constitution, which provides that a person is not required to supply information which may incriminate him, applies to the personal books and records which an individual taxpayer is required to keep according to Internal Revenue laws. This is a question which concerns the millions of United States taxpayers who file personal income tax returns. This Court has never decided this specific issue.

In *Shapiro* v. *United States*, 335 U.S. 1, this Court decided that the records required to be kept by the Emergency Price Control Act are public records and, therefore, the constitutional privilege does not apply to those records. The Court of Appeals for the Fourth Circuit in the case below on page 19 of its Opinion has construed the Shapiro case to be applicable to the personal books and records of this Petitioner thereby depriving him of his constitutional rights not to furnish information which may incriminate him.

We submit that the Court of Appeals below was in error in extending the public records doctrine of the Shapiro case to the books and records required to be kept by an individual taxpayer.

Although the Shapiro case was decided by this Court in 1948, a number of lower Courts since that time have proceeded on the assumption that the personal records required to be kept by a taxpayer are the proper subject of the privilege against self-incrimination contained in the Fifth Amendment. These Courts were concerned only with the question of whether the taxpayer had waived his constitutional right when he gave his books and records to a Revenue Agent under the mistaken belief that the Revenue Agent was only concerned with the civil liability. In none

of the cases has the Government taken the position that the books and records were not privileged. The Government's position was that the privilege was waived when the taxpayer voluntarily gave the books and records to the Revenue Agent. All the parties concerned in these cases proceeded on the basis that the taxpayer had the constitutional right not to produce his books and records for inspection by Revenue Agents and the only dispute was whether the taxpayer had waived his right. *U. S.* v. *Guerrina*, 112 F. Supp. 126 (D.C. PA, 1953), reargued in 1955, 126 F. Supp. 609; *U. S.* v. *Wolrich*, 119 F. Supp. 538 (S.D. D.C. N. Y. 1954); *U. S.* v. *Lipshitz*, 117 F. Supp. 466 (E.D. D.C. N. Y. 1954); *Montgomery* v. *U. S.* 203 F. (2d) 887 (CA 5 1953).

The Internal Revenue Service proceeded on the basis that the books and records are privileged. Thus Special Agent Kennedy testified at the trial in the District Court as follows (Transcript of Testimony page 681):

> "Q. (By Mr. Black) Why didn't you subpoena the records, Mr. Kennedy?
>
> A. It is my belief personally, it is a matter of law, and it is the policy of the Internal Revenue Service, and it is contained in a directive in the manual of the Intelligence Unit, Internal Revenue Service, that you should never issue process to compel the production of records or the testimony of any individual against whom we contemplate the possibility of recommending criminal prosecution in the future; we would be forcing him to testify against himself and, therefore, anything we got from him would not be admissible against him.

The question as to whether the public records doctrine of the Shapiro case applies to personal books and records of individuals in income tax cases has been of great concern to lawyers in the field of taxation and has been the subject of numerous articles in tax publications. See Redlich—"Searches, Seizures, and Self-Incrimination in Tax Cases" Tax Law Review, Vol. 10, No. 2, page 191 (January, 1955); Doyle "Motion Practice in Fraud Cases",

New York University Institute on Federal Taxation, Vol. 13, page 936 (1955); Albert J. Gould "The Taxpayers Constitutional Privileges in Income Tax Investigations" Vol. XXXI of DICTA, Monthly Journal of The Denver Bar Association, The Colorado Bar Association, The University of Denver College of Law (September 1954); Murphy "The Privilege Against Self-Incrimination", New York University Institute on Federal Taxation, Vol. 11, page 745 (1953); Lipton "Safeguarding Constitutional Rights in Tax Fraud Investigation" 32 Taxes 263 (1954); Kamens and Ancier "Immunity from Subpoena of Taxpayers' Records" 27 Taxes 639 (July 1949).

The constitutional rights of all accused persons must be zealously guarded and a prosecution under the income tax law does not require the complete abrogation of the rights granted an accused under the Bill of Rights.

2. The Trial Court's Charge Permitting the Jury to Consider Petitioner's Exercise of His Constitutional Rights as a Circumstance Determining the Issue of His Guilt Was Erroneous and Deprived the Petitioner of the Full Use of the Rights Granted to Him by the Bill of Rights.

Petitioner objected to the following instruction by the Trial Court:

> "In this connection, I instruct you that the taxpayer may exercise his constitutional right under the Fifth Amendment to the Constitutional to refuse to surrender or allow inspection of his books and records by revenue agents on the ground that to do so might tend to incriminate him in the event of criminal prosecution; and such constitutional privilege against self-incrimination is not impaired by the rule that the Court has just stated, that the taxpayer's failure to produce any books and records that he may have, at a reasonable time for inspection by revenue agents, is a circumstance which may be considered by you, the jury, in determining the issue of wilfully filing a false return, in a criminal proceeding such as this." (A. 368).

It is respectfully submitted that this instruction, while initially recognizing Petitioner's constitutional right, completely nullified the right by stating that the exercise of the right was a circumstance which might be considered by the jury in determining the issue of wilfully filing a false return.

This Court in *Boyd* v. *U. S.*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, (1886) established the proposition that the compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himeslf, within the meaning of the Fifth Amendment to the Constitution, and is also the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment. The Shapiro case did not overrule this case.

The rule of the Fifth Amendment that a defendant shall not be compelled in any criminal case to be a witness against himself equally forbids the drawing of any inferences from his non-production of privileged documents. *Wigmore on Evidence* (3 Ed.) Vol. 8, Sec. 2272, p. 419. The prohibition against commenting on or drawing inferences from the exercise of a Constitutional right is as vital as the recognition of the right itself. In *Johnson* v. *U. S.*, 318 U.S. 189, 196, 63 S. Ct. 549, 87 L. Ed. 704, this Court said:

> "* * * But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson v. United States, 149 U.S. 60, 37 L. Ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allow-

ance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' * * * We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial."

The Trial Court further charged the jury as follows:

"Also, I instruct you that the taxpayer who keeps records or books of account is required to produce them at a reasonable time for inspection by the duly authorized Government revenue agents in connection with their administrative duties in checking the correctness of the returns, and failure or refusal of the taxpayer to produce his books and records for such purpose is a circumstance which may be considered by you, the jury, in determining the issue of whether he has wilfully filed a false return. * * * (A. 368)

This instruction overlooked entirely that Petitioner's income tax return for the year 1944 was filed on March 15, 1945 and that production of records was not requested until April 6, 1948, more than three years after the filing of the return. By that time the limitation period for the assessment of additional income tax provided by *USC Title 26*, Section 275(a) had run. While the Internal Revenue Code (USC Title 26, sec. 3614(a) does not definitely limit the time within which books and records must be examined, the courts have applied the principle that an examination may not be made after the limitation on assessment has expired unless there is a showing made to the Court of some evidence of fraud. *Farmers & Mechanics Nat. Bank of Philadelphia* v. *U. S.*, 11 F. 2d 348; In Re *Andrews' Tax Liability* (D.C. Md.) 18 F. Supp. 804; *In Re Shapiro* (D.C. N.Y.) 39 F. Supp. 304.

It is clear from the foregoing cases that the Petitioner had an absolute right to refuse to permit the examination

of his books and records for the year 1944, which is the only year involved in this case, and the Trial Court's instruction was erroneous on the facts.

That the jury was confused by the inconsistent and contradictory parts of the instruction is evidenced by the fact that after it had deliberated for a number of hours the Foreman sent a note to the Judge asking if it was possible for the jury to have a copy of the Judge's charges pertaining to withholding records or books (A. 383). The trial judge had the jury brought into the courtroom and the challenged instruction was again given to the jury. The repetition of this erroneous instruction did not eliminate the confusion but merely accentuated its misleading character and obviously adversely affected the Petitioner in the jury's consideration of the vital issue in the case.

The error in the charge was not a harmless error. In *Ballenbach* v. *U. S.*, 326 U.S. 607, 66 S. Ct. 402, this Court stated:

> "But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue. * * * The influence of the trial judge on the jury is necessarily and properly of great weight and the jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading the error is not cured by a prior unexceptional and unilluminating abstract charge".

We submit that the Trial Court's charge to the jury in this respect was an infringement of the Petitioner's constitutional right and that it was so contradictory and confusing to the jury that it denied the Petitioner a fair trial. The Appellate Court below was in error in failing to find that the charge was erroneous and constituted a reversible error. The question of a proper charge to the jury in a criminal case is of sufficient importance that this Court should grant the Petition for a Writ of Certiorari as prayed for by the Petitioner.

3. The Government Failed to Prove a Proper Starting Point for the Net Worth. Therefore It Was an Error for the Trial Court to Submit the Net Worth Testimony to the Jury.

Under Method No. 1, Revenue Agent Ford claimed that Petitioner understated his income tax for 1944 by $454,-664.98.

Special Agent Kennedy using Method No. 2, the net worth, claims that Petitioner understated his tax by $58,-321.76. Thus we have two Government agents in great disagreement as to the alleged income of Petitioner. This enormous disparity is not reconcilable.

Special Agent Kennedy, who prepared the net worth statement, testified as follows:

> "I have no way of knowing that the defendant may not have had many more assets and many more liabilities for that matter" (A. 287).

Despite the fact that the Petitioner was a bookmaker and the testimony of Agent Ford that bookmakers needed cash to operate, Special Agent Kennedy in his net worth statement showed blank under the item "Cash on hand" at the beginning of the base year. Special Agent Kennedy's only proof of this item is contained in his testimony as follows:

> "Q. I note that they are blank, except for December 31, 1947, which is $15,000. Where did you get the figure?
> A. The $15,000 was found in Mr. Beard's safety deposit box when we inventoried it on April 6, 1948. At that time I asked Mr. Beard how long that money had been there, and he said he didn't know. I asked him if it had been there as of December 31, 1947, which is only three months and six days prior to the date of our conversation, and he said 'Yes', it had been there at that time. I asked him if that money, or any part of it, had been in his safety deposit box as of the end of the prior year, 1946, and he said he couldn't say that it had not been there that long ago. Therefore, I put it down for $15,000 cash on hand at the end of 1947, and none at the end of the prior years." (A 272-273).

There is no testimony in the entire record to support Special Agent Kennedy's starting point of "no cash on hand" as of December 31, 1943. The Government agents did not ask the Petitioner whether he had any cash on hand on December 31, 1943. The Government did not offer any testimony similar to that produced in other net worth cases to support its contention that the Petitioner had no cash on hand at the end of the base year. There was no evidence of the Petitioner's financial history which would negative the existence of cash on hand. Nor was there any evidence of Petitioner's tax returns for prior years. We respectfully submit that the evidence which the jury was permitted to consider in regard to the net worth part of this case was not sufficient upon which a verdict of guilty could be sustained. The failure of the Government to prove by some competent evidence the item of "no cash on hand" brings this case in conflict with the requirements of a proper starting point for net worth as set forth by this Court in *Holland* v. *U. S.* 348 U.S. 121 and *Friedberg* v. *U. S.*, 348 U.S. 142.

We submit that the District Court erred in permitting the evidence under the net worth method to go to the jury. The Appellate Court below erred in holding that the Trial Court's action was in harmony with the decisions of this Court in *Holland* v. *U. S.* and *Friedberg* v. *U. S.*

Whether the lower courts are properly following the markings laid down by this Court in net worth cases is of great importance. This Court should definitely decide whether the Government in a net worth case can start out with "no cash on hand" even though it has no evidence, not even the taxpayer's statement, to show whether or not there was cash on hand at the beginning of the base year.

CONCLUSION

For the reasons stated, the Petitioner asks that the Writ of Certiorari should be granted.

Respectfully submitted,

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